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Mark A. English
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Re: Homestead Acres Subdivision

Dear Mark:

We represent Levi and Barbara Britton, developers of the Homestead Acres Subdivision, which was the subject of a Planning Board Public Hearing on May 27, 2020. We request that you advise the Planning Board that there is no authority for the requirement that a road be constructed, as opposed to simply providing a right-of-way, to the adjacent undeveloped tracts.

There was a pre-approval meeting with the developer prior to the May 27, 2020 hearing, during which my client advises there was no mention of any requirement that a finished road be constructed. The regulations provide for a "Street right-of-way within the proposed subdivision ...to the boundary lines of the tract to be developed." Section 4.6.B.1., of the Yellowstone County Subdivision Regulations (regulations). It has an exception for "topography, or other physical conditions, or adjoining land cannot be subdivided or developed." Because my client understood the staff believes the exception for topography, physical conditions, or adjoining land, does not apply, my client did request a variance from the right-of-way requirement. At the meeting, the Board voted to deny that request.

At that public hearing, Monica Plecker incorrectly stated that the regulations allow the county to require a constructed road:

"Sure, so, at the plat review, the Planning Board did suggest that the staff as well as the applicant and an agent meet and kind of clarify a few things as there was an item of confusion as to whether or not, if the variance were denied and connection had to be made, if that would have to be constructed. The applicant, its agent and county legal, county public works, and Dave and myself all met and

discussed with the applicant that, you know, we felt it was very clear that the intent of the regulations is not only to provide the connection legally, through either right of way or easement, but to also construct it. So, I just wanted to clarify that we did have that conversation. That is where staff collectively stands on the issue.”

Excerpt from the video recording of the Zoom Planning Board meeting on May 27, 2020.

I can find no authority to support what Ms. Plecker says is the clear intent of the regulations. Section 4.6.B.1 of the regulations does not mention the construction of a road. In the language quoted in the second paragraph of this letter, it only states that a street right-of-way shall be provided to the adjacent tract.

As you know, the plain meaning of the regulation is controlling unless there is an ambiguity. The term “right-of-way” is not ambiguous. It means an easement for a road, but does not mean the road itself. The two terms are used throughout the code as distinguishable, a right of way being an easement for use, and a road construction meaning to build a road in compliance with county specifications. I am aware of no provision in the regulations, or elsewhere, where “right-of-way” is intended to mean a constructed road.

The only authority I can find in the regulations for the requirement of road construction is in Section 4.6.C.13. It provides that roads within the subdivision shall be “paved if they connect to an existing paved road...” That provision does not apply here, as the connection road does not connect to an existing paved road.

I understand you have referenced Section 5.1, which provides that the subdivider shall have installed all of the required improvements or enter into a subdivision improvements agreement. But that section does not apply to improvements that are not authorized. It expressly pertains to improvements “as stipulated in these Regulations (76-3-507(1), MCA.” That section of the Montana code says the subdivider is to complete required improvements within the subdivision (or provide security). It does not and cannot allow local governments to require improvements that are not authorized by its regulations.


It may be within the county’s authority to adopt a regulation to require construction of a road connecting to undeveloped tracts, whether or not it is wise to do so, but such an amendment must be done in accordance with the statute, including the public hearing on proposed regulations. *See* §§76-3-501, and 76-3-501, MCA. That has not been done before this plat was submitted. And the regulations that were in place when my client submitted the plat for review with sufficient information for that review are the ones that apply, whether the regulations are subsequently changed or not. §76-5-609(5), MCA.

If the county were to unlawfully make such a requirement as enunciated by Ms. Plecker, namely, a requirement that my client construct the road, my client estimates it would cost at least

\$150,000.00 to comply. My client would have little choice but to challenge such a decision by filing an court action. We hope that is not necessary. We would appreciate your providing us with confirmation that the county will not require the road construction. If you do not agree, please identify any authority you may have that supports a contrary position. I would appreciate a response within a week. Feel free to contact me if you wish to discuss this in the meantime.

Sincerely,

HENDRICKSON LAW FIRM, P.C.

By: 
Mark E. Noennig

MEN:cg
cc: Client